

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TINA BATY**

Claimant

VS.

**WOODHAVEN CARE CENTER**

Respondent

AND

**AMERICAN INT'L SO. INSURANCE**

Insurance Carrier

Docket No. **1,047,549**

**ORDER**

Claimant requests review of the January 4, 2010 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

**ISSUES**

At the November 24, 2009, preliminary hearing the claimant had requested both medical and mental health treatment. The Administrative Law Judge (ALJ) issued an Order finding claimant had suffered a work-related injury and designated Dr. Paul Stein as the authorized treating physician. The claimant's request for mental health and psychiatric treatment was taken under advisement. And in a separate order the ALJ referred claimant for an independent medical evaluation to be performed by Dr. Theodore Moeller to diagnose and determine whether claimant's current condition is causally related to her work duties for respondent. Those decisions were not appealed to the Board. Upon receipt of Dr. Moeller's report the ALJ issued an Order denying claimant's request for mental health treatment.

Claimant, Tina Baty, appeals the ALJ's decision denying her request for mental health treatment. Claimant contends that after her injury she was harassed by her supervisor and co-workers. She further contends that her co-workers were rude because she had to request their assistance performing her work because her restrictions limited her ability to perform her job duties. And her supervisor harassed her about her job performance. As a consequence she developed emotional distress which required her to seek psychological treatment on her own. Claimant argues her psychological condition

was directly caused by her physical injury at work and she is entitled to treatment for that condition.

Initially, respondent argues that the Board does not have jurisdiction to address the ALJ's Order denying medical treatment. In the alternative, respondent argues that there is no evidence of traumatic neurosis directly traceable to the physical injury. Accordingly, respondent requests the Board to affirm the ALJ's Order denying mental health treatment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The respondent argues the Board does not have jurisdiction on appeal from a preliminary hearing to address whether a psychological condition is directly traceable to the work-related accident and warrants treatment.

This is an appeal from a preliminary hearing order. By statute, not every alleged error is subject to review. The Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.<sup>1</sup> Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are: (1) did the worker sustain an accidental injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide the employer with timely notice and written claim; and, (4) do certain other defenses apply. The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.<sup>2</sup>

Whether a worker needs ongoing medical treatment or whether the employer is failing to provide necessary medical treatment are not jurisdictional issues listed in K.S.A. 44-534a that are subject to review from a preliminary hearing order. Those issues do, however, comprise questions of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>3</sup>

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<sup>1</sup> K.S.A. 44-551(b)(2)(A).

<sup>2</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

Whether a psychological condition is directly traceable to the work-related accident is a question that goes to the compensability of the condition or injury. Stated another way, it gives rise to a disputed issue of whether the psychological condition in this case arose out of and in the course of the employment. The Board's jurisdiction should not rest on whether the injury is physical versus mental or emotional. Furthermore, making such a distinction can have the undesired effect of delaying needed treatment. Accordingly, the Board finds it has jurisdiction to address the issue whether claimant's psychological condition is directly traceable to her work-related accident and the resulting physical injury.

Tina Baty started working as a certified nurse's aide for respondent on September 1, 2009. Claimant testified she injured her back during the first week of her employment and that she did not recall a specific event that caused her back to begin hurting. She alleged a series of repetitive lifting injuries from September 4, 2009 through September 17, 2009.

Before claimant started working for respondent, she had a low back injury in May 2009 with her previous employer, Larned Health Care Center. She testified she was back working full duty within a few weeks after that injury.

On September 16, 2009, claimant sought treatment with a chiropractor, Dr. Aaron Sauer, due to complaints of pain in her right side of her lower back and into her right leg.

Dr. Sauer placed restrictions on claimant which were provided to respondent. Claimant was advised that her employer was not able to accommodate the restrictions. But respondent referred claimant to Kathy Kodis, a physician's assistant, who recommended physical therapy and medication. Ms. Kodis placed a lifting weight restriction and claimant was eventually given accommodated work. Claimant completed the physical therapy that was recommended. Claimant then was referred to Dr. Stein.

But claimant alleged that after she returned to work for respondent with restrictions her co-workers and respondent's administrator harassed her to the point that she became emotionally distressed. Claimant explained:

Q. Okay. Did you eventually seek any psychiatric counseling?

A. Yes.

Q. And what for?

A. Stress, because of the way I was being treated at work.

Q. All right. Can you explain some of the situations that were causing you stress at work?

A. They changed my hours at work and brought me in at 30 minutes later than the CNA's that I had normally worked with, and the girls were upset because I wasn't allowed to help them. The assignments that were told to me to do was like brushing

their teeth, shaving the men and the women, things in that nature, but I wasn't allowed to push the residents in the wheelchair or pull or anything like that, so I was having to ask the CNA's if they would. It was upsetting them, they would tell me, no. Then I would get asked how come I'm not getting it done. Mary told me that she was going to write me up if I didn't communicate with the aides. I tried to explain that I'm trying, I mean, they're slamming doors in my face, they won't speak to me.

When I first started there was a policy about non-slip shoes, and I had talked to my DON about the shoes that I had ordered through a medical company, and she said if I brought documentation about them, that she would approve it. I did, and then all of a sudden out of the blue I'm getting corrected in front of all my co-workers about it. If I wasn't following the time thing, that sheet of paper that she gave me, I'd get called down in front of people. She was calling me in her office. I got wrote up because another CNA was yelling at me in the dining room, telling me that I was not doing anybody any good and that you ought to just go home. I was getting called into Mary's office every day about something I was not doing right, or why wasn't I getting this done.<sup>4</sup>

Claimant sought treatment with a psychologist who prescribed some medication to help relieve claimant's anxiety and depression. The psychologist recommended that claimant see a counselor/therapist as well. Claimant testified that her anxiety, depression and phobia are related to the harassment at work. The psychiatrist that claimant sought treatment from concluded her anxiety was due to the harassment she was receiving at work.

In a letter dated November 23, 2009, Dr. Patrick Stang opined:

In my opinion, her depression and anxiety are directly related to the treatment she was subjected to by staff at the nursing home where she has been working after her back injury at that facility. The hostile work environment she describes did, I believe, lead to the onset of her depression and anxiety symptoms, which are now quite severe requiring both medication and therapy treatment.<sup>5</sup>

Claimant testified that she is still having back pain but since she has been off work her back symptoms have improved.

As previously noted, the ALJ ordered an independent medical examination of claimant by Dr. T. A. Moeller, a licensed psychologist. After meeting with claimant on two separate occasions and conducting interviews as well as testing, Dr. Moeller concluded that claimant's current emotional distress was neither the consequence of nor an

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<sup>4</sup> P.H. Trans. at 19-21.

<sup>5</sup> *Id.*, Cl. Ex. 1.

exacerbation of the work-related physical injury involving claimant's right-sided back pain. Instead, the doctor concluded claimant's emotional distress was a result of interpersonal distress and discord experienced with both co-workers and supervisors as well as her domestic partner. The doctor further noted that claimant's interpersonal altercations and stresses are not related to her workplace physical injury.

In his report, Dr. Moeller noted in pertinent part:

While obvious that Ms. Baty reasons her emotional distress to be a result of the accident, that is not indeed the case.

Her current distress does not present as either the consequence of or exacerbation of the work-related physical injury involving her right-sided back pain.

Rather, her emotional distress is a result of the interpersonal distress and discord she has experienced with both co-workers and supervisors, and more recently with her domestic partner.<sup>6</sup>

Later in his report, Dr. Moeller again notes the cause of claimant's emotional distress:

It was Ms. Baty's experience with the hostile and critical interpersonal experiences in her work place environment that engendered her current emotional distress.

While her co-workers' and administrator's reported actions may have been connected to the inconveniences caused them by Ms. Baty's work-related injury, again, it was not the work-related physical injury which caused Ms. Baty's current psychological distress.

It was her perception, accurate or not, of other Woodhaven employees' and Mr. Gary White's treatment of her that caused her emotional distress.<sup>7</sup>

Psychological treatment is available to a workers compensation claimant when he/she 1) sustains a work related physical injury; followed by 2) symptoms of traumatic neurosis; when 3) the neurosis is directly traceable to the physical injury; and 4) a casual connection between the work performed and the neurosis.<sup>8</sup>

In this instance claimant has suffered a work-related physical injury and has been diagnosed with depression and anxiety. The controlling factor is whether those conditions are directly traceable to the physical injury. The ALJ adopted the opinion of Dr. Moeller and concluded that claimant had failed to establish her need for mental health treatment was directly traceable to her physical injury. This Board Member agrees and affirms.

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<sup>6</sup> IME filed Dec. 28, 2009, at 12.

<sup>7</sup> *Id.* at 13.

<sup>8</sup> *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 77 P.2d 577, *rev. denied* 245 Kan. 784 (1989).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>10</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 4, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this 31st day of March 2010.

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DAVID A. SHUFELT  
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>9</sup> K.S.A. 44-534a.

<sup>10</sup> K.S.A. 2009 Supp. 44-555c(k).